No. 18729

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellant,

vs.

JAMES A. A. SMITH, etc.,

Appellee.

APPELLANT'S CLOSING BRIEF.

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ARGUMENT.

I.

The Uncontradicted Facts Are That Appellee Assumed and Performed the Executory Contracts.

The operation of the business of Conair by appellee, both as Receiver and Trustee, pursuant to the orders of the Bankruptcy Court, was in all respects a mere continuation of the business that did not interrupt the prior practices of Conair in respect to the delivery of the products under the job purchase orders that were on hand when appellee took over. These job purchase orders that called for the delivery of products had been delivered to Conair prior to the assumption of duty by appellee as Receiver and each one was an order for the delivery of specific products under a basic contract [Tr. 30]. Contrary to what appellee asserts in his

brief (Br. p. 4), it was not the basic contracts that had been assigned to appellant but rather "all monies now due or which may hereafter become due to the assignor [Conair] from" Conair's named customers. These assignments had been effectuated prior to any bankruptcy proceeding and between the dates of September 22, 1960 and November 1, 1960 [Tr. 30].

Each executory contract that was assumed and performed by appellee under which appellant is entitled to receive payment on its assignments was a job purchase order as one of a series of contracts under the applicable basic contract [Tr. 30 and 34] and not as appellee argues (Br. p. 12) merely the basic contract. There would have been no contract to invoice and collect the account receivable upon if there had been no job purchase order.

Appellee states (Br. p. 4) that he did not know about the assignments from Conair to appellant, but, as stated further by appellee (Br. p. 4), the "Notice of Assignment of An Account Or Accounts" was duly filed on September 22, 1960 under Sections 3017, *et seq.* of the California Civil Code. Therefore, despite what appellee argues, the assignments were a matter of public record concerning which appellee is deemed to have had notice.

Appellee's statement that he did not intend to assume any of the bankrupt's executory contracts but that he only filled job orders to liquidate the assets (Br. p. 4) is merely his self-serving conclusion that is not supported by the acts that he performed as evidenced by the stipulations and his own testimony.

The delivery of the products, invoicing, and creation of the accounts receivable under the job purchase orders

was handled in all respects as it had been before the Chapter XI was filed by Conair, and appellee told Feland, who continued to operate the business under the directions of appellee, as follows [R. 41]:

> "I told him if they needed to, to go ahead and sell it or if these contracts were still good and they would accept them, to go ahead and convert the material and work in process on hand to completed merchandise to deliver."

II.

The Authorities Referred to and Interpreted by Appellee Do Not Hold That the Assumption of the Executory Contracts by Appellee Required an Express Order of the Bankruptcy Court for Enforceability.

There was at least tacit approval of the Bankruptcy Court for the assumption of the executory contracts by the Order of November 2, 1960 which authorized appellee as Receiver "to continue and carry on with the business as conducted by the said Debtor until further order of this Court" [Tr. 3]. Also the further order of the Bankruptcy Court authorized the appellee as Trustee to continue the current operation of the business of Conair [Tr. 16].

Section 70b of the Bankruptcy Act specifies that "* * * the *Trustee* shall assume or reject any executory contract * * *" [emphasis added] and it does not specify that the assumption shall first be approved by the court. Section 70b of the Bankruptcy Act in respect to other matters specifically requires approval of the court.

Appellee refers to 4 *Collier on Bankruptcy,* pp. 1357-1359 (Br. pp. 13-14) but that quotation does not sup-

port the proposition that an assumption without the express approval of the Bankruptcy Court is invalid. That author of the treatise merely concludes that the "*proper procedure*" is for the Trustee to apply to the court and it further states that the court "*should*" pass upon his application.

The case of *In re Philadelphia Penn Worsted Company,* 278 F. 2d 661 (C. A. 3, 1960), cited by appellee (Br. p. 14), does not hold that Bankruptcy Court approval was essential for the valid assumption of the contract because the court said (p. 664) that the Receiver's agreement for the sale of the land was merely an executory contract under the law of Pennsylvania and that it was, therefore, properly rejected by the newly appointed Trustee.

The case of *In re Forgee Metal Products,* 229 F. 2d 799 (C. A. 3, 1956), referred to by appellee (Br. pp. 14-15), was not a case in which there was an express order directing the Trustee to specifically assume the contract. The court said (p. 802) that there was an "in effect assumption of the contract". The court in the *Forgee* case did not think that the Trustee had followed the correct procedure but upheld the assumption of the contract, and the court said (p. 802):

> "Therefore we stress the necessity of receivers and trustees adhering strictly to the provisions of the Bankruptcy Act and the obligation of the referees to see to it that they do."

Appellee (Br. p. 15) misconstrues the holding in the case of *In re Public Ledger,* 161 F. 2d 762 (C. A. 3, 1947), because the District Court decision, 63 F. Supp. 1008 (E. D. Penn. 1945), was reversed on the basis

that the conduct of the Trustees amounted to an assumption of the executory contracts and the lower court had determined to the contrary.

In the case of *In re Schenectady Ry. Co.,* 93 F. Supp. 67 (N. D. N. Y., 1950), referred to by appellee (Br. pp. 15 and 23), the court said (p. 70):

> "No judicial decision is cited which might be termed a precedent in this case and it would seem that the determination of the question would depend upon the particular facts involved."

The further case of *Pacific Western Oil Co. v. McDuffie,* 69 F. 2d 208 (C. A. 9, 1934), cited by appellee (Br. pp. 15-16), supports the proposition that there may be an assumption of an executory contract by conduct but in that particular case the court held that the conduct was such as not to constitute an assumption. The court said, (p. 213):

> "What, then, are the implications which inhere in the situation? The receiver immediately advised the directors of appellant that for the oil delivered prior to the receivership he would require appellant to file a general claim—upon no other condition would he continue dealing with appellant."

The court further said in that case (p. 213):

> "Adoption may be signified either by express agreement or by implication."

The case of *In re Luscombe Engineering Co.,* 268 F. 2d 683 (C. A. 3, 1959), referred to by appellee (Br. pp. 16-19), was not a case where the court decided that there had been no assumption of executory contracts by the Trustee because there had been no order relating to that by the Bankruptcy Court, but this

was a case where the court discussed the acts of the Trustee and decided that they did not constitute an assumption of the executory contracts. The court, concerning the Philco part of the matter, said (p. 685):

> "We attribute decisive importance to the fact that, as concerned future performance, Philco had elected to terminate its contract with the bankrupt because of Luscombe's defaults before the trustee took any action with reference to the subject matter."

The court in the *Luscombe* case, *supra,* concerning the Chrysler contract said (p. 686):

> "* * * the trustee never undertook to complete the contract, it was agreed during the bankruptcy that the trustee would surrender the tools and dies and that Chrysler would pay him forthwith the total unpaid balance of the cost of these articles, a sum which would have been payable in instalments under the original contract."

The case of *In re Italian Cook Oil Corp.,* 190 F. 2d 994 (C. A. 3, 1951), referred to by appellee (Br. pp. 20-21), was a case where the court found from the conduct of the trustees that there was an assumption of an executory contract. There was no order of the Bankruptcy Court providing for that assumption by the trustees. The theory of the court that a valid assumption of an executory contract could be effectuated by the trustees without an order of the Bankruptcy Court is unaffected by the fact that the bankruptcy proceeding was under Chapter X of the Bankruptcy Act.

Two cases referred to by appellee (Br. pp. 15 and 20-22): *In re Swindle,* 188 F. Supp. 601 (D. Ore., 1960), and *In re DeLong Furniture Co.,* 188 F. 2d 686 (E. D. Penn., 1911), were cited by appellant (Op. Br. pp. 12-13) merely for the proposition that the trustees by the adoption of the executory contracts thereby became liable for the burdens of them; the burden in the instant case is to have appellant collect on its assignments.

III.

The Litton Industries, Inc. Executory Contracts Were Assumed and Performed by Appellee as Receiver and Section 313(1), Chapter XI, of the Bankruptcy Act Applies.

Appellee operated as Receiver of Conair from November 2, 1960 until he was appointed Trustee on January 4, 1961 [Tr. 2-3 and R. 19]. The three invoices on the Litton Industries, Inc. accounts receivable are dated respectively November 4, 10 and 14, 1960 [Tr. 31-32]. The invoices were dated concurrently with the delivery of the products [Tr. 30]. Section 313(1) of the Bankruptcy Act provides in part that the Bankruptcy Court may "(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate."

There was no order of the Bankruptcy Court permitting appellee as Receiver to reject the executory contracts with Litton Industries, Inc. It would follow that since the contracts with Litton Industries, Inc.

could not have been rejected, and were fully performed under appellee's receivership administration, they were therefore assumed by appellee. Appellee's brief says that executory contracts in Chapter XI proceedings may be rejected at any time before confirmation of the plan and that the plan itself may provide for rejection (Br. p. 11). Appellee's references, however, are not pertinent to the present case and, furthermore, 8 *Collier on Bankruptcy* (14th Ed.) pp. 229-230 says:

> "Where an arrangement provides for the rejection of an executory contract, the rejection itself is not effective unless and until the arrangement is confirmed * * *."

Further 8 *Collier on Bankruptcy* (14th Ed.) p. 227 says:

> "Whether the debtor is in possession, or whether there is a receiver or trustee, the contract can be rejected only by affirmative action under §313(1) or §357(2). Unless so rejected, the contract continues in effect."

The Litton Industries, Inc. transactions took place during the Chapter XI proceedings and were handled in all respects as they would have been by Conair before the Chapter XI proceeding.

Appellant is entitled to retain the sum of $11,450.59 that it has collected on the Litton Industries, Inc. accounts receivable. This sum of $11,450.59 is part of the sum of $21,554.66 that the appellant has collected on accounts receivable that the Bankruptcy Court and District Court have erroneously ordered appellant to pay over to appellee.

IV.

The Appellee by Adoption of the Executory Contracts Became Liable to the Appellant on Its Assignments.

Appellee argues (Br. 24-26) that even if he did adopt Conair's executory contracts he is not liable to appellant on its assignments. Appellee does not cite any authority for his argument and the cases cited in Appellant's Opening Brief on that point hold to the contrary. Furthermore, 4 *Collier on Bankruptcy* (14th Ed.) pp. 1361-1362 says:

> "The trustee's assumption of an executory contract operates as a complete transfer of all the bankrupt's contractual rights and contractual liabilities therein. The transfer is not cumulative in effect—that is, the trustee is not added to the bankrupt as another debtor, jointly or severally liable with the bankrupt. It involves a complete elimination of the bankrupt, his discharge from his contractual relations, and his replacement by the trustee."

Appellee also refers (Br. pp. 25-26; to appellant's original, superseded Petition in Reclamation that is not a part of the record on appeal in this case but which appellee reproduces in part in the appendix to his brief. The original Petition in Reclamation was superseded by the Second Amended Petition in Reclamation [Tr. 20-28]. Appellee did not file any answer to the Second Amended Petition in Reclamation and he is not now in a position to contend that appellant waived any of its rights by anything contained in the original Petition in Reclamation. Appellee stipulated in writing and the Bankruptcy Court, by its Order of May 29, 1962, authorized appellant to file its Second Amended Peti-

tion in Reclamation and it was further provided in the stipulation and Order that appellee should have ten days to answer or otherwise respond thereto [Tr. 18-19]. Also it is not true that appellant admitted in its original Petition in Reclamation that all of the Litton Industries, Inc. sums belonged to appellee, as stated by appellee (Br. p. 26).

V.
Conclusion.

Appellee performed the executory contracts that were on hand at Conair when he took over his administration of duties as an officer of the Bankruptcy Court. The Appellee's performance of the executory contracts was in all respects the same as if Conair had performed them without the intervention of any bankruptcy proceeding. It was conceded by appellee that the inventory would have been valueless except for his performance of these executory contracts [R. 16-17]. It does not follow, therefore, as argued by appellee (Br. p. 18), that there was any loss to the bankruptcy estate in an amount equal to the value of the merchandise involved, because that merchandise without performance of the executory contracts was valueless. The appellee is in possession of the total sum of $55,301.35 that he has collected from customers of the bankrupt on accounts receivable that had been assigned by Conair to appellant [Tr. 34]. Since appellee has possession of this amount of money, at least, from his operation of the business of Conair, it can hardly be correctly contended by him

that his operation and assumption of the executory contracts constitutes in any way a losing proposition to the bankruptcy estate. The Court herein should permit appellant to retain the sum of $11,450.59 on the Litton Industries, Inc. accounts receivable and receive a sufficient additional amount from the sum of $55,301.35 held by appellee to pay the Bank the balance of its promissory note which now has a principal balance of $24,654.68, plus interest.

Respectfully Submitted,

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HARRIS B. TAYLOR,
Attorneys for Appellant Bank of America National Trust and Savings Association.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRIS B. TAYLOR